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**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: W.R.M. Construction, Inc.

File: B-239847

Date: September 18, 1990

Richard L. Basinger, Esq., Basinger & Morga, P.C., for the protester.

E.L. Harper, Department of Veterans Affairs, for the agency.
Richard P. Burkard, Esq., Andrew T. Pogany, Esq., and
Michael R. Golden, Esq., Office of the General Counsel, GAO,
participated in the preparation of the decision.

DIGEST

Where a commercial bid bond form limits the surety's obligation to the difference between the amount of the awardee's bid and the amount of a procurement contract, the terms of the commercial bond represent a significant departure from the rights and obligations of the parties as set forth in the solicitation, which renders the bid bond deficient and the bid nonresponsive.

DECISION

W.R.M. Construction, Inc. protests the rejection of its bid under invitation for bids (IFB) No. 649-09-90, issued by the Department of Veterans Affairs, for construction of an outpatient clinic and related work.

We deny the protest.

The IFB was issued on January 8, 1990 and required the submission of a bid guarantee. Amendment 2, which became effective February 23 and extended the bid opening date to March 20, amended certain specifications and incorporated FAR § 52.228-11 (FAC 84-53). This provision requires, among other things, that individual sureties on a bid guarantee who pledge real estate provide evidence of title in the form of a certificate of title prepared by a title insurance company and provide a copy of the lien filed in favor of the government. FAR 52.228-11(b)(2)(i) (FAC 84-53). By letter dated April 18, the agency notified W.R.M. that its bid was rejected for failure to provide evidence of title in the form of a certificate of title prepared by a title insurance

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company and a copy of the lien filed in favor of the government. W.R.M. filed its protest with our Office on May 29, alleging that it was not aware of the requirements specified above.

In the agency report, the Department of Veterans Affairs states that W.R.M.'s bid was also rejected because it submitted a defective bid bond form. In its comments to the agency report, W.R.M. argues that it was never informed that its commercial bond form would not be acceptable and asserts that the agency should have provided it the standard form. We have reviewed the record and find that W.R.M. offered a deficient bid bond, and that this rendered its bid nonresponsive. We therefore need not review W.R.M.'s allegations regarding the agency's other basis for rejection of its bid.

The IFB contained a bid guarantee clause which provided that "in the event the contract is terminated for default, the bidder is liable for any cost of acquiring the work that exceeds the amount of its bid, and the bid guarantee is available to offset the difference."^{1/} The IFB further cautioned that a bidder's failure to furnish a bid guarantee in the proper form and amount might be cause for rejection of the bid. W.R.M. submitted a bid bond on a commercial form.

The VA determined that W.R.M.'s bid bond was unacceptable because it did not afford the government the necessary protection. In an April 19 letter from the Director, Acquisition Management Service, to the Director, VA Medical Center, Prescott, Arizona, the agency stated that since the bond used by W.R.M. did not cover "any cost" that the government might incur in reprocurring the work in the event of a default, the bid should be rejected as nonresponsive.

A bid guarantee assures that the bidder will not withdraw its bid within the time specified for acceptance and, if required, will execute a written contract and furnish performance and payment bonds. When the guarantee is in the form of a bid bond, it secures the liability of a surety to the government if the holder of the bond fails to fulfill these obligations. O.V. Campbell and Sons Indus., Inc., B-216699, Dec. 27, 1984, 85-1 CPD ¶ 1. The guarantee also is available to offset the cost of reprourement of the

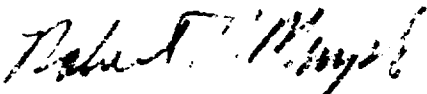
^{1/} Default in this context means the successful bidder's failure to execute any post-award contractual documents and furnish payment and performance bonds. Allgood Elec. Co., B-235171, July 18, 1989, 89-2 CPD ¶ 58.


goods or services in question. See Kiewit Western Co., 65 Comp. Gen. 54 (1985), 85-2 CPD ¶ 497. A bidder's use of a commercial bid bond form, rather than the standard government form, is not per se objectionable, since the sufficiency of the bond does not depend on its form, but on whether it represents a significant departure from the rights and obligations of the parties as set forth in the IFB. See Allgood Elec. Co., B-235171, supra.

W.R.M.'s bond, by its express terms, stated that the surety would only be liable for the difference between the amount of W.R.M.'s bid and the amount contracted for with another firm to perform the same work, provided that such amount does not exceed the penal sum. The surety's liability, as set forth in this bond, thus significantly differs from that required under the explicit terms of the IFB, which provide for the government to recoup "any cost of acquiring the work that exceeds its bid." We have viewed this language as permitting the government to recover, for example, administrative costs or the cost of performing in-house. Consequently, W.R.M.'s promise merely to cover the difference in prices provides insufficient protection to the government. Id.

As stated above, this deficiency in the bid bond alone renders the bid nonresponsive, and we need not decide the propriety of the additional rejection ground stated by the VA.

The protest is denied.



 James F. Hinchman
General Counsel